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No. 01-1118

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is a non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Rutherford Institute litigates and educates on behalf of constitutional rights, civil liberties and human rights. Attorneys affiliated with the Institute have filed petitions for writs of certiorari and *amicus curiae* briefs in many cases in the Supreme Court, and have represented parties on the merits in several significant First Amendment cases, including parties in the prior appearance of the instant case before the Court, *NOW v. Scheidler*, 510 U.S. 249 (1994). Rutherford Institute affiliate attorneys have defended the First Amendment rights of pro-life protestors in numerous other lower court cases as well.[2]

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[1] Counsel of record to the parties in this case have consented to the filing of all *amicus curiae* briefs on behalf of any party, pursuant to blanket consents filed with the Court on May 8, 2002 (Petitioners' counsel) and May 9, 2002 (Respondents' counsel). No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g., Palmetto State Medical Center v. Operation Lifeline*, 117 F.3d 142 (4th Cir. 1997); *West Hartford v. Operation Rescue*, 991 F.2d 1039 (2nd Cir. 1993); *New York v. Operation Rescue*, 80 F.3d 64 (2nd Cir. 1996); *Lucero v. Trosch*, 121 F.3d 591 (11th Cir. 1997); *Veneklase v. City of Fargo*, 78 F.3d 1264 (8th Cir. 1996), *cert. den.*, 519 U.S. 867 (1996), further appeal at 248 F.3d 738 (11th Cir.) (*en banc*), *cert. den.*, 122 S.Ct. 42 (2001). *See generally* John W. Whitehead, *Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis*, 48 WASH. & LEE L. REV. 77 (1991).

Government.

The Court's *amicus* will address its arguments solely to the second Question Presented in No. 01-1118, whether the Hobbs Act criminalizes the activities of political protestors who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there. *See* Petition for Writ of Certiorari, at i. This question raises the extremely important issue of whether there exist constitutional limits to the use of the civil tort system to exact speech-chilling sanctions against protestors for aggressive speech on politically divisive issues, on the dubious basis that such protestors are "extorting" an intangible property right or civil right possessed by the business and its customers.

SUMMARY OF ARGUMENT

Amicus respectfully submits that the Seventh Circuit's longstanding view that mere apprehension of loss of business due to the actions of Hobbs Act defendants is sufficient to give rise to liability under the Act, reiterated in *Scheidler II* and applied to political protestors, perpetuates archaic *Lochner*-era notions of "intangible property rights," and criminalizes the infringement upon such intangible rights by conduct that historically has been viewed as protected under the First Amendment. *See NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).

ARGUMENT

Abortion clinics frequently seek to employ the civil liability provisions of the RICO Act[3] as a tool for limiting abortion

[3] 18 U.S.C. § 1962(c).

protests. RICO was enacted with broad language in the intent to provide claimants and courts with all the tools necessary to combat the economic effects of organized crime. The salient provision of RICO makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or the collection of an unlawful debt."[4] A "pattern" of RICO activity occurs if two "predicate acts" are committed within a ten-year span.[5]

In *Scheidler I*, the Supreme Court unanimously rejected the argument that RICO could not be construed to apply to political protestors because they lacked an economic motivation to constitute an "enterprise" under RICO. 510 U.S. at 258-259. The Court as a whole did not address RICO's potential chilling effects upon free speech or associational rights. However, Justice Souter, concurring, recognized that RICO had the potential to infringe upon legitimate free speech rights. *Id.* at 806, n.6 (Souter, J., concurring). As one commentator noted after *Scheidler I*, it would appear that "any politically unpopular protest movement with resulting property damage or technical trespass can be elevated to a federal crime."[6] Due to the uncertain limits of RICO, many abortion protesters are hesitant to engage in expressive activity out of

[4] 18 U.S.C. § 1962(c).

[5] 18 U.S.C. § 1961(5).

[6] Angela Hubbell, *FACEing the First Amendment: Application of RICO and the Clinic Entrances Act to Abortion Protesters*, 21 OHIO N.U. L. REV. 1061, 1067 (1995). *See also* Comment, *Regulating the Abortion Clinic Battleground: Will Free Speech be the Ultimate Casualty?*, 21 Ohio N.U. L.Rev. 995 (1995).

fear of being subjected to RICO liability. RICO can be particularly intimidating because of the potential assessment of triple damages, the stigma facing racketeering charges, and the possible legal costs that could be involved.[7] Since *Scheidler*, several courts have ruled on the merits of RICO claims against pro-life protesters, with varying (and sometimes conflicting) results.[8]

Scheidler II now reviews the Northern District of Illinois' judgment against three pro-life protest leaders and their organizations for their efforts to demonstrate outside Chicago area abortion clinics. The Petitioners were ordered to pay over eighty-five thousand dollars to two abortion clinics, which award was trebled pursuant to RICO.[9] Although the Respondents neither alleged nor proved that Petitioners were personally directly responsible for the alleged acts of federal and state extortion that formed the predicate offenses necessary to prove a RICO enterprise existed, the court allowed them to link to Petitioners various violent acts committed by other anti-

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[8] 18 U.S.C. § 1964(c).

[7] *See, e.g., Palmetto State Med. Ctr. v. Operation Lifeline*, 117 F.3d 142 (4th Cir. 1997) (no evidence existed to show that Operation Lifeline or any of the individual defendants engaged in any illegal activities on the particular dates alleged by the plaintiff-hospital); *Planned Parenthood v. American Coalition of Life Activists*, 945 F.Supp. 1355 (D.Or. 1996) (plaintiffs adequately stated RICO claims against all defendants but one); *National Org. of Women v. Scheidler*, 1997 WL 610782 (N.D.Ill. 1997) (permitting certain RICO claims to proceed against defendants, while granting judgment for plaintiffs on other RICO claims).

[9] *NOW, Inc. v. Scheidler*, No. 86-C-7888, 1999 U.S. Dist. LEXIS 11980 (N. Dist. Ill. July 28, 1999).

abortion protesters who were not parties to the case.[10]

The Seventh Circuit Court of Appeals affirmed the decision.[11] On the key issues that have now been presented to the Supreme Court, the Seventh Circuit ruled in favor of NOW. The appeals court held that violations of the federal extortion law, the Hobbs Act, could establish that there were "predicate acts" of racketeering committed, even though the Hobbs Act requires proof that the accused individuals sought to obtain "property" of another person – clearly not the intent of the protesters. 267 F.3d at 709.

> [Petitioners'] primary contention on this point is that the Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear," and that the things [Respondents] claim were taken here – the class women's rights to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to provide medical services and otherwise conduct their businesses – cannot be considered "property" for purposes of the Hobbs Act. However, this circuit has repeatedly held that intangible property such as the right to conduct a business can be considered "property" under the Hobbs Act, *see, e.g., United States v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983), and we will not revisit that holding here.

267 F.3d at 709. The Seventh Circuit likewise reiterated its

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[10] *See* L. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L.REV. 853, 888 (1999).

[11] *NOW, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001).

prior holding that "as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required." *Id.*, citing *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir. 1995).

The Court's *amicus* urges that, for the reasons discussed herein, the Court of Appeals' broad reading of the definition of "extortion" under the Hobbs Act, coupled with the historically expansive reading of the term by other Circuits construing the Act, poses an unacceptable threat to the First Amendment free speech rights of protestors and demonstrators across the political spectrum. Conceivably, the Court of Appeals' decision could chill not only pro-life protestors, but union organizers and picketers, civil rights activists, environmental activists and globalization opponents. The resulting landscape of public fora, though undoubtedly quite a bit more peaceable, would in no way resemble the places for "robust, uninhibited and wide-open"[12] debate the First Amendment was intended to protect.

I. THE "INTANGIBLE RIGHTS" THEORY OF EXTORTION REVIVES ABSTRACT *LOCHNER*-ERA NOTIONS OF ABSOLUTE PROPERTY RIGHTS WHICH ARE NO LONGER VALID AND WILL DETER PUBLIC OPPOSITION TO BUSINESS.

The fundamental error in the Seventh Circuit's decision is that it creates out of thin air a federal common law of

[12] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). *See* J. Raskin and C. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 AMERICAN U. L.R. 179 (2001).

intangible property rights that is radically more expansive than the law recognizes in any other context. "Obtaining property" illegally as extortion has to mean something more than simply interfering with or affecting another's exercise of his property rights. The intangible right not to have a business affected by outside influence is not, and would not, be recognized as "property" under the Fifth Amendment Takings Clause, environmental law, bankruptcy law, or RICO's "enterprise" requirement.

The Hobbs Act defines "extortion" as: "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2). *Scheidler II* defines the "obtaining of property" as encompassing protestors' deprivation of a business' right to operate free of interference, and its customers' right to receive such services. 267 F.3d at 709. But the protestors have not "obtained" anything unless it is the imagined "property" interest in the abstract not to be interfered with by political opponents. This hopelessly circular definition of "property" would transform all simple torts at the state level into federal extortion. It is a doctrinal move of breathtaking dimension that would be rejected in every other area of the law.

The notion that an outsider "takes" property whenever she influences a business's decisions is the same theory of absolute property rights espoused in *Lochner v. New York*, 198 U.S. 45, 63-64 (1905). In *Lochner*, the Court held that a law restricting a business' right to operate as it saw fit was a deprivation of a constitutionally protected business right without substantive due process. *Id.*

Lochner is no longer the law. When government restricts how a business may conduct its affairs, this restriction is not a

"taking of property" unless the owner has been substantially dispossessed of his land. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) and cases cited therein. Even though the regulation may remove one stick in the business's bundle of rights, it is not a "taking of property," even if the business's prohibited conduct was not inherently blameworthy or noxious. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130-131, 133 n.30 (1978). *Penn Central* recognized that the 19th century regime of absolute property rights is over. Businesses are influenced by a multitude of pressures, including government regulation and outside protest. *Cf. NAACP v. Claiborne Hardware*, 458 U.S. at 913 ("While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case."); *cf. Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (railroad company had right to attempt legislative change to trucking regulations, although its purpose in doing so was anticompetitive). This does not mean that the business has been dispossessed of its property every time it experiences outside influence.

The Takings Clause provides a good litmus test for the phrase "obtaining property." If the government ordered the Respondent health clinics to stop performing abortions altogether, the clinics would nonetheless have no "taking of property" claims under the Fifth Amendment (although they might have First and Fourth Amendment claims under *Roe v. Wade*). Likewise, if the National Labor Relations Board ordered an employer to recognize a union or to change its employment practices, it would not have a "taking of property" claim.

The intangible right to influence a business' conduct is also not recognized as "property" under environmental law. For

example, citizens who claim the right to restrain a business's toxic dumping do not possess by virtue of that right any "property" right over the offending business that would entitle them to the extra remedies of RICO. *See Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918 (3rd Cir. 1991) (unlawful toxic dumping not remediable under RICO) and *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir. 1986) (same), *cited in Oscar v. University Students Co-op Ass'n*, 965 F.2d 783, 786 (9th Cir. 1992) (*en banc*). If the Seventh Circuit's view applied consistently, neighbors of a polluting business *would* have an intangible property interest in the offending business, simply because they claim a legal power to restrain the business's conduct of its affairs. If a legal claim to control a business' toxic dumping does not confer "property" on environmentalists under RICO, then RICO cannot consistently label them as extortionists seizing an "intangible property right" when they picket or protest to achieve the same end.

Likewise, bankruptcy law treats a business's promise to modify its conduct as only a contractual obligation, not a *property* interest of the promisees. For example, a business's obligation to clean up toxic wastes does not make the affected neighbors into secured lienholders in its property if the business goes bankrupt. Persons affected by a business' toxic waste have no secured property right over the business. A bankrupt business may normally liquidate its clean-up obligations and discharge them as an unsecured claim in bankruptcy. *See Ohio v. Kovacs*, 469 U.S. 274, 282 (1985); *In re Jensen*, 995 F.2d 925, 929-931 (9th Cir. 1993).

This fact shows the inconsistency in the Seventh Circuit's intangible rights theory of property. If environmentalists succeed in compelling a business to change its conduct (*e.g.*, by signing a code of clean business conduct), they have not obtained a secured property right (like a lien) that would be

recognized in bankruptcy proceedings. If a labor union forces a business to sign a collective bargaining agreement, that agreement is not a secured property right, even though it restricts how the business conducts its affairs. The bankrupt business may reject those agreements under certain conditions, *see* 15 U.S.C. § 1113, as it could not with a property lien held by a secured creditor. Yet *Scheidler II* holds that protestors who seek to induce concessions from health care providers *are* "obtaining property" in violation of the Hobbs Act if they commit any civil wrong in their protests. This is an inconsistent doctrine.

The Supreme Court implicitly rejected the "intangible property rights" theory in deciding when outsiders can be said to "conduct[ ] or participat[e], directly or indirectly, in the conduct of an enterprise" in *Reves v. Ernst & Young*, 507 U.S. 170, 184-185 (1993). *Reves* held that outsiders who harm a business cannot be said to "conduct or participate," even indirectly, in the conduct of the business' affairs within the meaning of RICO, 18 U.S.C. § 1962(c). Only actual insiders meet that test. *See* 507 U.S. at 185. *Reves*' interpretation of 18 U.S.C. § 1962(c) cannot be ignored in construing the Hobbs Act, 18 U.S.C. § 1951(b)(2). The statutes involve the same concept: when does a tort-feasor obtain the business that she harms? If the intangible-rights theory of extortion were valid, the Supreme Court could not have rejected the plaintiff's theory of "enterprise" in *Reves*. Harming a business would have been the same as obtaining an intangible control over the business. This was rejected in *Reves*, yet this is the theory of "obtaining property" revived here.

The Ninth Circuit Court of Appeals properly saw through this argument in *Monterey Plaza Hotel Ltd. Partnership v. Local 483*, 215 F.3d 923 (9th Cir. 2000). *Monterey Plaza* concerned an employer's attempt to employ a similar rationale

to impose RICO liability upon a labor union based on predicate acts of mail and wire fraud under 18 U.S.C. §§ 1341 and 1343. 215 F.3d at 926-927. The statutes at issue were designed to prevent deceptive communications by wire, radio or television. They explicitly require an intent to obtain "money or property [from the one who is deceived] by means of false or fraudulent pretenses, representations, or promises." §§ 1341 and 1343; *see United States v. Lew*, 875 F.2d 219, 221 (9th Cir. 1989). The Ninth Circuit held:

> The Union did not obtain property by deceiving the Hotel or its customers; the Union was simply carrying on a strategy in a protracted labor dispute. *The Union's conduct may have been vexatious or harassing, but it was not acquisitive. The purpose of the mail fraud and wire fraud proscriptions is to punish wrongful transfers of property from the victim to the wrongdoer, not to salve wounded feelings.*

Id. at 927 (emphasis added). The Court should take the same cautious road as the Court of Appeals in *Monterey Plaza*, recognizing that a regime that punishes speakers for intangible harms is simply too evanescent to administer without certain damage to the cherished right to protest.

II. THE "INTANGIBLE-RIGHTS" THEORY OF "EXTORTION" WILL DETER PUBLIC OPPOSITION TO BUSINESS.

The Seventh Circuit's expansion of the Hobbs Act makes a difference only when *the challenged conduct is not otherwise a RICO predicate act*. When a defendant commits crimes that are independently punishable by more than a year's imprisonment, *see* 18 U.S.C. § 1961(1), the RICO plaintiff does not need to rely on the Hobbs Act to claim them as

predicate acts. The expanded use of "extortion" theories will only be relevant when the alleged misconduct is too minimal to trigger RICO on any other ground.

The Hobbs Act does not define any minimum threshold for "extortion." Before civil RICO, courts tried to contain the application of the Hobbs Act by admonishing prosecutors to invoke it only for serious offenses. *See, e.g., United States v. Brecht*, 540 F.2d 45, 52 n.14 (2nd Cir. 1976) (instructing U.S. Attorney to "exercise careful judgment" in deciding whether to commence a federal prosecution for conduct so close to a state-law misdemeanor). This was only a plea for moderation, not a rule of law. After the explosion of civil RICO, courts can no longer count on neutral prosecutors to keep the Hobbs Act within reasonable limits. Unlike United States Attorneys, private businesses suing their adversaries under civil RICO have no public duty to confine their extortion charges to "really serious" conduct.

Furthermore, businesses that want to rid themselves of activists will have every incentive to make out "extortion" claims against them, even for minimal or non-existent wrongs. Because RICO provides for mandatory attorneys' fees to a prevailing plaintiff, 18 U.S.C. § 1964(c), proof of even nominal damages will impose a ruinous attorneys' fee liability on the protestor to pay the business's corporate lawyers. There is no similar provision for fees to prevailing RICO defendants if the suit turns out to be baseless.

This means that businesses can use intangible-rights extortion charges to drive their opponents out of the public arena. "It is not difficult to imagine what impact RICO would have had on Dr. King's Southern Christian Leadership Council. Segregationist forces could have used the extraordinary damages provision to cut the financial legs out from under the

movement." Note, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819, 821 (1996). The activist organization does not have an equivalent RICO remedy for the business's crimes and torts, because ordinary citizens have no RICO-enforced "intangible property rights" against wrongs committed for *pro*-business (and anti-union or anti-environmental) motives. *See Oscar*, 965 F.2d at 785-786.

This outcome is not Congress' fault. So long as the courts stick to the plain meaning of the phrase "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear," the Hobbs Act does not lend itself to the suppression of social activism. This language addresses something more than interference with a business – it requires the outright expropriation of property from a victim, with the victim's coerced consent. No other area of the law would accept the outrageous "intangible rights" theory of property advanced here, which is nothing less than the criminal-law ghost of *Lochner*.

III. BY ADOPTING THE HOBBS ACT'S CRIMINALIZATION OF "EXTORTION" AS THE "OBTAINING OF PROPERTY FROM ANOTHER, WITH CONSENT" WHERE SUCH CONSENT "IS INDUCED BY THE WRONGFUL USE OF ACTUAL OR THREATENED FORCE, VIOLENCE, OR *FEAR*," THE SEVENTH CIRCUIT'S DECISION INTRODUCES SUBSTANTIALLY VAGUE AND OVERBROAD JUDICIAL RESTRICTIONS ON ACTIVITIES OF POLITICAL PROTESTORS.

Even assuming that the intangible-rights theory applies to the actions of Petitioners and others similarly situated, the term "fear" is substantially vague and overbroad as construed by the Circuit Courts of Appeal and is in critical need of clarification

by the Supreme Court to provide clear guidelines when the Hobbs Act is applied, if at all, to political protestors. The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, *or fear*, or under color of official right." 18 U.S.C. § 1951(b)(2) (emphasis added). The Hobbs Act element of fear has been interpreted in various ways by the Circuit Courts of Appeal. Although some Circuits are similar in their application of the Hobbs Act, they differ in how they determine the degree of reasonableness of the fear that is generated in the victims. Some Circuits require actual knowledge that adverse action will result if the victim fails to comply with requests made by the defendants, while others merely require that the victim felt fearful, and that the defendant was of the sort of character that would exploit such fear.

In *Callanan v. United States*, 223 F.2d 171 (8th Cir. 1955), a mere conversation between a labor representative and an employer was found to induce reasonable fear in the employer on the part of the organizer. 223 F.3d at 176. The employer vocalized his fears concerning the quality of work he would receive from the organizer's labor pool and the organizer suggested a price that the employer could pay so his fears would not be realized. *Id.* at 175. The employer agreed on a certain price after some negotiation with the organizer. *Id.* The court held that the offense of extortion had been committed if the defendants "illegally created fear in the victim, which fear has induced the victim to part with his money or property," regardless of whether the defendant was responsible for "any past activities in the way of prior illegal strikes or unfair labor practices which may have created the fear, or whether the fear may have been created by what might have happened to others in similar cases." *Id.* In other words, extortion may be found absent a direct threat; the defendant

need only play on the victim's fear – based on circumstances not of the defendant's making – in order to obtain the property.

The Second Circuit followed the Eighth Circuit's reasoning in *Callanan*, and further elaborated on the reasonableness of fear by the victim, in *United States v. Tolub,* 309 F.2d 286 (2nd Cir. 1962). The Second Circuit found that the evidence submitted as to the reasonableness of the victim's fear was sufficient, which included the testimony by the victim that he was "overwrought" because he felt he had to pay money to the defendant, a union organizer. *Id.* at 288. The court also held that there was sufficient evidence from which a jury could find that Tolub was in a position of harm, and fear of such harm was reasonable. *Id.* This evidence included Tolub's duties, which showed that he was in a position to "influence the employees, to cause slowdowns and stoppages," even if such acts were not approved by the union. *Id.* at 289. The court affirmed that the jury was able to find inducement of fear from the testimony of the victim as to state of mind. *Id.* Also, if the victim knew of the position of the defendant as a union official, "deliberately imposed fear" could be inferred solely based on that position. *Id.*

Similarly, in *Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963), the Court allowed evidence a defendant's bad moral character because it showed the defendant's alleged plan to instill fear and the subsequent generation of fear in the victims. In *Carbo*, boxing promoters linked with organized crime attempted to gain control of the boxers themselves along with the rights to showcase the boxer's fights by intimidation of the boxer's managers and extortion of funds. The court held that the prosecutor must prove that the victims considered this defendant to "be dangerous and that fear reasonably resulted." *Id.* at 741. *See also United States v. Billingsley* 474 F.2d 63 (6th Cir. 1973) (character evidence admissible of a labor

organizer to show generation of fear in victim).

The Fifth Circuit has read the Hobbs Act even more liberally, holding that the Government need not show that fear was a direct consequence or that the victim personally feared the Defendant. *United States v. Sander*, 615 F.2d 215 (5th Cir. 1980). The Court found an extortionate act when a zoning board member informed a land developer that the payment of $10,000 would ensure a favorable vote and may eliminate any trouble he could encounter in obtaining a zoning permit. *Id.* at 217. The Court classified this act to be a "subtle extortion" since the victim did not actually fear the defendant, but rather feared economic harm. *Id.* at 218. The Court further held that the Government satisfies its burden of proof if the circumstances surrounding the alleged acts render the victim's fear reasonable. *Id.* The plaintiff faced a potential loss of millions of dollars, which induced him to part with his money, and the Court held this uncertainty to be a threat adequate to establish reasonable fear. *Id.* at 219.

The most in depth explanation of the element of fear as used in the Hobbs Act derives from jury instructions affirmed by the Sixth Circuit in *United States v. Russo*, 708 F.2d 209 (6th Cir. 1983). In *Russo*, the defendants were charged with violations of the Hobbs Act for forcing an employer to make payments to a union pension and welfare fund. *Id.* at 210. The jury instructions stated in part:

> Fear is a state of anxious concern, alarm or apprehension of anticipated harm. *It does not necessarily refer to physical fear or fear of violence. It includes fear of economic loss.* It exists if you find beyond a reasonable doubt that by threats of the defendant, fear of economic loss was created in the victim's mind, or that the defendants knowingly and willfully used the victim's fears of economic loss; and under the circumstances it was reasonable for the victim to have such fear; and that the defendant made use of such fear to extort or attempt to extort.

Id. at 213. The Court of Appeals held that the instructions properly required only a finding of fear of economic loss. *Id.* The opinion drew a cautionary concurrence by District Judge Holschuh, who admonished that aggressive labor protest not be chilled by RICO liability:

> In labor's struggle for higher wages and better working conditions and in management's efforts to minimize labor costs, the use of threats of economic loss is commonplace. Employees threaten to shut down an employer's plant by strike if their demands for higher wages are not met; employers in today's economy have threatened to shut down their own plants if employees do not agree to reduce their wages.... This case... may be the first case in which the Hobbs Act has been held to apply to activities between an employer and the employer's own employees while engaged in an attempt to resolve a labor dispute over terms and conditions of employment. The ramifications of the majority opinion are both far-reaching and, to me, troublesome for both labor and management.

708 F.3d at 216-217 (Holschuh, *D.J.*, concurring in result) (citation and footnotes omitted).

CONCLUSION

The federal courts should not interpret a federal statute to take over and swallow up an entire field of state regulation absent explicit Congressional direction. *See Patterson v.*

McLean Credit Union, 491 U.S. 164, 183 (1989) (42 U.S.C. § 1981 will not be read to cover all claims for breach of contract involving racial animus, since this would federalize state law without clear Congressional authority and direction); *United States v. Jones*, 529 U.S. 848 (2000) (Commerce Clause authority does not permit Congress to enact federal criminal legislation based upon conduct historically within the authority of States to penalize). This reasoning applies equally here. Even the most minimal intrusions upon property interests – those merely sufficient to give rise to a cognizable apprehension of loss of business – would become predicate acts of "extortion" sufficient to subject protestors to federal racketeering judgments, since such conduct would deprive the business of an intangible right to operate free of disruption. The federal courts should not read a federal statute this broadly without clear authority from Congress. For the reasons stated above, the Court of Appeals should be reversed.

Respectfully submitted,

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